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# FCC Regulation and Other Oxymorons: Seven Axioms to Grind

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Federal Communications Commission Chairman Mark S. Fowler had the right animal in mind when he described the FCC as "the last of the New Deal dinosaurs."<sup>1</sup> What he must have visualized is a creature with a head too small for its body, a body too big for its environment, and a tail that just goes on and on.

Appropriately enough for such an outdated reptile, the Commission traditionally has taken an antediluvian approach to policy-making. It would be nice (and certainly charitable) to characterize the FCC as a forward-thinking agency that approaches its role with foresight, and with its bureaucratic feet fixed firmly on the ground of reality. But, alas, that is not the case.

The FCC rarely takes advantage of the 20/20 hindsight available to it, and, as a result, often stumbles through a haze of fuzzy thinking borne of its own past decisions. All too often the Commission has let itself be guided by slogans which are not only well worn, but worn out. But, despite the Commission's quaint, and, we submit, inappropriate approach to its regulatory chores, it has not sent American society or the communications industry tumbling back to the age of the vacuum tube.<sup>2</sup>

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1. Fowler, *Broadcast Unregulation in the 1980's*, TELEVISION Q., Spring 1982, 7-9.

2. Many would argue, however, that had it not been for the FCC's antiquated approach to UHF television, FM radio and cable television, these services would have

Today, however, telecommunications policy has reached a crucial stage in its evolution, as "Star Wars" type technologies, once thought fanciful, are becoming a reality. Futurists have heralded this "technological explosion"<sup>3</sup> as the dawn of a new "Information Age" that will transform the nature of American society.<sup>4</sup> The government agency that must play a major role in leading the country into its post-industrial future is (ready or not) the Federal Communications Commission. On the bright side, the Commission has a chance to foresake its past mistakes and instead, step into the light of a new day.

We are not overly sanguine about the future. George Santayana wrote of historical lessons, "Those who cannot remember the past are condemned to repeat it."<sup>5</sup> The danger of historical lessons is that those who *do* study the past may simply find *other* ways to err. Nonetheless, and for whatever risk it entails, we will review some of the regulatory axioms<sup>6</sup> which guided the Commission in the past and which, in our view, would best be relegated to the archives lest they gum up the works any more than they already have:

**Antediluvian Axiom 1: Government Always Knows Best: The Cod Liver Oil Approach to Business Behavior**

**Antediluvian Axiom 2: Bigness Is Always Bad, Or, Less Is More**

**Antediluvian Axiom 3: Act Now, Think Later: Sleigh Before the Reindeer Decision-Making**

**Antediluvian Axiom 4: The Best Way to Cut Red Tape Is Lengthwise**

**Antediluvian Axiom 5: When In Doubt, Mumble**

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developed and prospered at a much earlier date. See E. KRASNOW, L. LONGLEY AND H. TERRY, *THE POLITICS OF BROADCAST REGULATION*, 35-43 (1982). Peter's Bureaucratic Principle seems an apt description of FCC policy-making in this regard: "Bureaucracy defends the status quo long past the time when the quo has lost its status." L. PETER, *PETER'S QUOTATIONS* 83 (1977).

3. "Explosion" is the mod word to describe contemporary phenomena . . . . Appropriately enough, one of the most prominent explosions is in communications about the communications explosion. One is tempted to define the communications explosion as a proliferation of meetings, papers and speeches on the theme "Gee whiz—ain't science terrific!" which produces an outward burst of verbosity that spews verbal debris in all directions.

Loevinger, *The Sociology of Bureaucracy*, *THE BUS. LAW.*, Nov. 1968, at 7.

4. See J. NAISBITT, *MEGATRENDS* (1982); A. TOFFLER, *THE THIRD WAVE* (1981).

5. G. SANTAYANA, *THE LIFE OF REASON* (1906); J. BARTLETT, *FAMILIAR QUOTATIONS* 867 (1968).

6. "As any geometry student knows, there is no arguing about axioms. They are given to be accepted." R. KHARASCH, *THE INSTITUTIONAL IMPERATIVE: HOW TO UNDERSTAND THE UNITED STATES GOVERNMENT AND OTHER BULKY OBJECTS* 13 (1973).

**Antediluvian Axiom 6:** The Best Technical Standard Is No Technical Standard

**Antediluvian Axiom 7:** The Raised Eyebrow Is An Uplifting Regulatory Gambit



**Antediluvian Axiom 1:**

### **Government Always Knows Best: The Cod Liver Oil Approach to Business Behavior**

Born in 1934, in the midst of the New Deal, the FCC historically approached regulation as if it had a birthright flowing from its New Deal heritage. The dominant theme of the New Deal was that anything private business could do, government could do better—or, when in doubt about a problem, procrastinate, then regulate. Taylor Branch has divided New Deal agencies into two categories: “deliver the mail” agencies and “Holy Grail” agencies.<sup>7</sup> “Deliver the mail” agencies perform neutral, mechanistic tasks; they send out Social Security checks, procure supplies—or, at least in theory, deliver the mail. “Holy Grail” agencies, on the other hand, are given the more contro-

<sup>7</sup> T. Branch, *We're All Working for the Penn Central*, WASH. MONTHLY, Nov. 1970 at 8, 20.

versial and difficult role of achieving some grand moral or civilizing goal. The Federal Radio Commission, precursor to the FCC, came into being primarily to "deliver the mail"—to act as a traffic cop of the airwaves in order to prevent harmful interference. But both the FRC and the FCC had a vague Holy Grail clause written into their charters: the requirement that they uphold the "public interest, convenience and necessity." This classic catch-all phrase has enabled the FCC to be not only the airwaves' traffic cop, but its vice and morals squad as well.<sup>8</sup>

From inception, the FCC embarked on a zealous search for the Holy Grail, and journeyed further than many of its sibling agencies created in the 1930's. Undaunted by the tremendous growth in the electronic media—growth which undercut many bases for the regulation as perceived in 1934—the FCC charged on, with its regulation of the broadcast industry hitting a high water mark in the mid-to-late 1970's.

In the tradition of the Emperor with his new clothes, the Commission apparently did not think it was regulating programming content. After all, both the first amendment and section 326 of the Communications Act<sup>9</sup> would seem to discourage such regulation, a fact which even the Commission acknowledged . . . while it proceeded to regulate programming. The FCC's quest for the Holy Grail in broadcasting in the 1970's was particularly substantial in the regulation of programming content. It included such minutiae as the precise

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8. A passage from the Supreme Court's majority opinion in *National Broadcasting Co. v. FCC*, 319 U.S. 190 (1943), is perhaps the most frequently cited authority for the expansive view of the FCC's regulatory mission:

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.

319 U.S. 215-16 (Murphy, J. and Roberts, J., dissenting). One commentator characterized the above quote as:

perhaps the most misinterpreted words in the judicial history of broadcasting regulation . . . . Many readers of this part of the decision have taken this to mean that the Court was approving FCC dictation of program content. In context, however, these two sentences simply say that the Commission has the authority to *select* licensees as well as to "supervise" them. "Traffic" in the Court's analogy refers to licensees, not to programs.

F. KAHN, *DOCUMENTS OF AMERICAN BROADCASTING* 125 (4th ed. 1983).

9. 47 U.S.C. § 326 (1976).

method broadcasters had to follow in consulting members of their communities before formulating programming schedules, and the minimum amounts of nonentertainment programming a broadcaster had to air.<sup>10</sup> The Commission told broadcasters how much time they could dedicate to commercials in any given hour,<sup>11</sup> and even decreed that certain commercials five minutes or more in length were *per se* against the public interest.<sup>12</sup>

The Commission has begun to retreat from this position. In 1981, it "deregulated" four aspects of the commercial radio industry by eliminating rules and policies concerning program logs, commercial time limitations, ascertainment of community problems, and nonentertainment programming requirements.<sup>13</sup> The Commission based its deregulation decision on its finding that the radio industry is sufficiently competitive to permit marketplace forces to exercise the regulatory role previously played by the government. In the words of Commissioner Anne Jones, the Commission recognized that the time had come "to stop treating broadcasters like little children."<sup>14</sup> The Supreme Court agreed with this approach when, in 1981, it recognized that the marketplace, albeit imperfect, often results in greater diversity of program formats than can be achieved by the pronouncements of the FCC.<sup>15</sup> As Bernard Wunder, Jr., former Assistant Secretary of Commerce for Communications and Information, observed:

[I]t is not necessary for the competitive marketplace to work perfectly in order to make it preferable to traditional kinds of highly detailed, intrusive, and expensive regulation. All that the marketplace has to do is work *as effectively* as regulation to make it the preferred option. And, as former CAB Chairman Alfred Kahn has repeatedly noted, "It's not hard to work 'as

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10. In Re Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1976).

11. See 47 C.F.R. § 0.281 (1982).

12. In Re Public Notice Concerning the Applicability of Commission Policies on Program Length Commercials, 44 F.C.C.2d 985 (1974).

13. In Re Deregulation of Radio, Notice of Inquiry and Notice of Proposed Rulemaking, 73 F.C.C.2d 457 (1979), Report and Order, 84 F.C.C.2d 968 (1981), *aff'd in part and remanded in part*, Office of Communications of the United Church of Christ v. FCC, No. 80-1032, slip op. (D.C. Cir. May 10, 1983).

14. Statement of Commissioner Jones at Meeting of the Federal Communications Commission (Jan. 14, 1981) (audiotape of meeting available from FCC, Washington, D.C.).

15. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

effectively' as regulation."<sup>16</sup>

One might conclude from all this that Antediluvian Axiom 1 is already vestigial. Not so. The Commission has not yet extended its radio deregulation decision to television licensees. And even the "deregulated" radio industry is still subject to many nitpicking rules and policies. For example, a broadcaster who regularly offers live coverage of horse racing from a legalized track places his license in jeopardy.<sup>17</sup> It is also contrary to FCC policy for a radio station to announce that it is "presenting" a live performance by a musical artist or group unless the licensee is sharing in the profits or losses of the appearance.<sup>18</sup> Yet nothing in the FCC's requirements prohibits a station from announcing that it is "welcoming" the musical artist. This Talmudic exercise in semantics is certainly inconsistent with the FCC's recent deregulatory zeal. There are other Alice-in-Wonderland rules and policies on the books—rules and policies which the FCC thus far has not seemed overly anxious to repeal.<sup>19</sup>

This Dr. Jekyll/Mr. Hyde approach to content regulation might be benign were it not for many issues currently facing the FCC, in part as a result of developing communications technologies. The Commission may soon consider (or reconsider) the regulatory policies to govern teletext, direct broadcast satellites (DBS), and multipoint distribution services (MDS). All of these services could be subject to content regu-

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16. *Broadcast Reform Proposals, 1981: Hearings on H.R. 4726, H.R. 4780, and H.R. 4781 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 84 (1981)* (statement of Bernard J. Wunder, Jr.).

17. See 47 C.F.R. §§ 73.4125, 73.4176, 73.4130 (1982); *In Re Broadcasting of Information Concerning Horseracing*, 41 F.C.C.2d 172 (1973); *Declaratory Ruling*, 32 F.C.C.2d 705 (1971). It should be noted, however, that the Commission has proposed eliminating this policy as part of a broader effort to prune what the Commission has identified as "regulatory underbrush," defined as:

[T]he accumulation of Commission policies, doctrines, declaratory ruling[s], rules, informal rulings and interpretive statements that have grown up around major regulations over the years. These 'underbrush' matters . . . have the potential to impede the competitive functioning of the marketplace by stifling broadcasters' discretion in much the same manner in which small vines can choke a healthy tree.

FCC News Release, Rep. No. 17631 (Aug. 5, 1983).

18. *In Re Complaint Against Doubleday Broadcasting Co.*, 55 F.C.C.2d 763 (1975).

19. Former FCC Chairman Newton Minow once described the FCC as "a vast and sometimes dark forest, where FCC hunters are often required to spend weeks of their time shooting down mosquitos with elephant guns." N. MINOW, *EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST* 258-59 (1964).

lation if the Commission's New Deal alter ego compels it to reassert its old role as social engineer. At minimum, the long-term impact of today's policy-making regarding these new technologies should force a rethinking of the appropriateness of content regulation in a telecommunications marketplace vastly different from that of 1934.

Apart from questions presented by the developing technologies, the Commission may be given other opportunities to dictate what we see and hear. For example, the FCC is being pressured to decide the amount, content and type of children's television programming.<sup>20</sup> Efforts are also underway to amend the Communications Act to require broadcasters to offer specific percentages of nonentertainment programming.<sup>21</sup> In sum, Antediluvian Axiom 1 may remain alive at the FCC for quite some time.

#### **Antediluvian Axiom 2:**

### **Bigness Is Always Bad, Or, Less Is More**

In casting about for historical antecedents on which to model its own regulatory work, the Commission has not restricted itself to the New Deal. One can find traces of such disparate influences as Puritanism, Benign Despotism, or other blasts from the past. The trouble is that the FCC does not seem to be able to figure out when enough is enough; when the old approach really ought to be relegated to the history books. Take, for example, its multiple ownership rules. (Or, as Henny Youngman would say, "Take these rules, *please*.") The Commission, plagiarizing the nostrum of the old trust busters, concluded early on that it would be best to minimize the number of media outlets any one individual or group could own. That was not a totally off-the-wall idea fifty years ago when there were few media outlets. Today, however, such scarcity does not exist in most communities. Not only are multiple broadcast signals available, but there are also cable television systems, some of which have capacity to provide more than one hundred video and/or audio channels, and an alphabet soup of newer services (e.g., STV (subscription television), PPV (pay per view), SMATV (satellite master antenna television), and MDS). An estimated 28% of television households currently receive ten

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20. *Action for Children's Television v. FCC*, No. 82-2438 (D.C. Cir. 1982).

21. H.R. 2370, 98th Cong., 1st Sess., 129 Cong. Rec. H1808 (March 24, 1983).



or more television stations over the air and 80% receive five or more signals.<sup>22</sup> Not too far over the rainbow are DBS services, low power television (LPTV), and multi-channel MDS systems. In other words, far from a drought in media channels, there is now a decent reservoir, and in the near future there may well be a flood.

The current restrictions on broadcast ownership are essentially the same ones adopted in earlier times. VHF television licensees are barred from acquiring cable systems or radio stations in their markets.<sup>23</sup> No entity may own more than seven of any kind of broadcast station,<sup>24</sup> even though no similar restrictions apply to cable, DBS, LPTV, MDS or newspaper ownership. Broadcasters cannot own two stations in the same broadcast service with overlapping primary coverage areas,<sup>25</sup> even though cable operators may provide multiple channels of programming to subscribers residing in an equivalent area.

The Commission's inconsistency comes of rules and policies having their genesis at a time when broadcasting was, along with newspapers, the only game in town. And because newspapers were clearly outside the realm of government regulation and broadcasting was viewed as inside, the conventional wisdom being that broadcast frequencies were "scarce," it made sense then to parcel out stations stingily. These factual predicates belong to history now. Cable television has joined the mass media ranks, swelling the number of available channels significantly. Indeed, it is ironic that daily newspapers, which have never been subject to federal regulation, have decreased in number (only 36 cities have more than one daily newspaper), while precisely the opposite has occurred in the medium whose regulation was justified by the "scarcity rationale."<sup>26</sup> As a result of these changes, the Commission must recognize that its overly restrictive ownership rules, which do not

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22. J. Levy and F. Setzer, *Measurement of Concentration in Home Video Markets* 81 (Office of Plans and Policy, Dec. 23, 1982) (Available from FCC).

The 1982 Annual Report of the American Broadcasting Companies graphically describes the new video marketplace as "the increasingly leaky living room." *The New Dimension of Television: An ABC Essay* 7.

23. 47 C.F.R. § 636 (1982).

24. 47 C.F.R. §§ 73.35, 73.240, 73.636 (1982).

25. *Id.*

26. See e.g., STAFF OF SENATE COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, 98TH CONG., 1ST SESS., PRINT AND ELECTRONIC MEDIA: THE CASE FOR FIRST AMENDMENT PARITY (Comm. Print 1983).

make sense in today's marketplace of abundant media outlets, will make even less sense in tomorrow's.

**Antediluvian Axiom 3:**

**Act Now, Think Later: Sleigh Before the Reindeer  
Decision-Making**

Everybody likes to play Santa Claus, and the FCC is no exception. The trouble is that sometimes in its rush to hand out treats to new competitors in the media marketplace, the FCC does not stop to consider the consequences until it is too late, when the intended benefits of its actions may have been lost or gotten stuck on the roof. A classic case in point is low power television (LPTV).

LPTV (or "Toy TV" as some FCC officials call it) was an idea which gained momentum in the late 1970's. It is a new broadcast service consisting of low powered television stations intended to serve narrowly circumscribed areas (i.e., within a radius of 10-15 miles). The allocation standards to be applied to such a new service were designed so as not to interfere with existing, full power television stations. The proceeding aimed at developing those standards was instituted in 1980.<sup>27</sup> But, in its generous dash to hand out presents, the Commission left the house without its pants and announced that it would authorize "interim" LPTV operations pending adoption of final allocation standards.<sup>28</sup> In other words, the FCC invited people to apply for facilities for which there were no technical standards, much less any appropriate application form. These factors did not discourage the thousands of applicants eager to participate in this "gold rush" for television spectrum space.

Two aspects of this situation should be emphasized. First, any time the FCC is confronted by thousands of applications (and, at last count, the number was around 12,000<sup>29</sup>), the agency's resources to deal with such masses of paper are overwhelmed. As a result, mere organization of the LPTV applications became an institutional circus. More fundamental, however, was the embarrassing problem of what the devil to do

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27. Notice of Proposed Rule Making in BC Docket 78-253, 83 F.C.C.2d 449 (1980).

28. The Commission's decision to authorize interim operations, which occurred immediately prior to the 1980 elections, prompted speculation that there may be a connection between the two events.

29. See *LPTV Complaints*, BROADCASTING, March 21, 1983, at 60.

with them once they had been sorted out and placed in neat piles. There were, after all, no standards governing their technical acceptability. As a result, virtually all of the applications are gathering dust in the files, despite the expectations of the thousands of applicants—expectations which the FCC created and graciously nurtured. Even after the Commission hastily adopted some skeletal LPTV rules in 1982,<sup>30</sup> applications were processed at a glacial pace—a year after the rules were adopted, only about 200 of the 12,000 or so applications had been granted, and less than 50 of those stations were on the air.<sup>31</sup>

Did the Commission learn from its mistakes in the LPTV debate? Obviously not.<sup>32</sup> In 1982, it issued “interim” authorizations to a number of applicants for DBS licenses, although fundamental questions about the new service were left (where else?) dangling in space. The FCC’s well intentioned present was meant, of course, to give DBS applicants a headstart, so that they could be prepared to offer the new service shortly after international satellite agreements are reached in the next few years.

The DBS authorizations do not create the large complications of LPTV, simply because the number of applicants with the alleged technological expertise and financial backing is much more limited. Nonetheless, DBS service will displace existing terrestrial users of the 12 GHz band, and its authorization has signalled a radical departure from the FCC’s professed emphasis on “localism” in the licensing of broadcast services. Neither of these questions has been resolved, and yet, the FCC has given DBS applicants the “all systems are go” signal to start spending the hundreds of millions of dollars necessary to

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30. See Report and Order in BC Docket 78-253, 51 RAD. REG. 2d (P & F) 476 (1982).

31. The following Bureaucratic Law provides an apt description of the FCC’s processing of interim LPTV applications:

Running a project in this office is like mating elephants—(A) it takes a great deal of effort to get on top of things; (B) the whole affair is always accompanied by a great deal of noise and confusion, the culmination of which is heralded by loud trumpets; (C) after which, nothing comes of the effort for two years.

P. DICKSON, *THE OFFICIAL RULES* 22 (1978).

32. In another context, former FCC Commissioner Glen Robinson warned the FCC to learn from its mistakes: “One does not have to drop an egg on a hard floor a dozen times to learn that it will break. With a modest knowledge of eggs and hard floors even a single drop seems superfluous.” *In re Prime Time Access Rule*, 50 F.C.C.2d 829, 892 (1975) (Robinson, Comm’r, dissenting).

blast DBS off the ground.<sup>33</sup>

However commendable the Commission's giving spirit might be, it should recognize that interim authorizations are often undertaken at great private and public expense. Interim authorizations may be appropriate in exceptional situations in which failure to expedite the authorization could foreclose future options for Commission action. Unless such foreclosure can be demonstrated, however, the Commission should be extremely reluctant to take the "interim" route. In most instances, that route leads to frustration and needless expense on the part of all concerned, regardless of the fact that the "interim" route may be paved with good intentions.<sup>34</sup>

#### Antediluvian Axiom 4:

### The Best Way to Cut Red Tape Is Lengthwise

At the end of the last decade, the Commission won two prizes in the paperwork (or perhaps more aptly, papermill) field—one from the General Accounting Office, for the agency requiring the largest number of worker hours to fill out its forms and comply with its rules; the other from the Small Business Administration, for the agency with the largest number of forms and applications.<sup>35</sup>

To its credit, the Commission has made serious, and largely

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33. Commissioner Anne Jones appropriately described this type of interim authorization as "the 'pits'—a preliminary, interim, temporary system." In an FCC meeting on the authorization of DBS, Jones queried:

Having authorized the construction of what could be several hundred million dollars worth of satellites, and having promised an exciting new TV medium, would the Commission then have the courage to determine that a 'permanent' DBS system was not in the public interest and hence relegate several hundred million dollars worth of newly authorized hardware to the scrapheap?

*Pungent Observations Have Been Jones Hallmark*, Communications Daily, April 11, 1983, at 6.

34. This axiom was stated, perhaps most eloquently, by James H. Boren, president of the International Association of Professional Bureaucrats (bureaucratically abbreviated INATAPROBU). The Boren Principle of Error Implementation states:

Errors implemented by inaction are less dangerous than errors implemented by action. Errors by inaction have less impact and more mushistic graduality than errors of action. Graduality provides time for adjustment and of accommodation, and permits institutional homeostatis to take place. The degree of graduality is the Mush Factor of Error Implementation.

J. BOREN, HAVE YOUR WAY WITH BUREAUCRATS: THE LAYMAN'S GUIDE TO PYRAMIDING FEATHERHEADS AND OTHER STRANGE BIRDS 21 (1975).

35. One wag has observed: "Pornography to a bureaucrat is a blank sheet of paper." J. BOREN, THE BUREAUCRATIC ZOO: THE SEARCH FOR THE ULTIMATE MUMBLE 6 (1976).

successful, efforts to cut back on unnecessary paperwork requirements, possibly spurred by the unfavorable publicity arising from the GAO and SBA findings, and the enactment in 1980 of the Paperwork Reduction Act.<sup>36</sup> In the 1980's, the Commission shortened the broadcast renewal forms to the size of a postcard, eliminated its annual broadcast financial reporting requirement, relaxed filing requirements for ownership information, and threw out its program logging rules for commercial radio licensees. It has also shortened its application requirements for new broadcast station construction permits and for assignments of licenses and transfers of control.<sup>37</sup> Other possible areas of paperwork reform include elimination of requirements for television and noncommercial radio stations.<sup>38</sup>

### Antediluvian Axiom 5:

#### When In Doubt, Mumble

James H. Boren, author of *The Bureaucratic Zoo*, *The Search for the Ultimate Mumble*, summarized the technique of many government bureaucrats: "When in charge, ponder; when in trouble, delegate; when in doubt, mumble."<sup>39</sup> The FCC is a master of the bureaucratic mumble. This mastery is best illustrated in the area of comparative renewal policy. That policy governs the Commission's resolution of proceedings in which a new applicant files an application to oust a renewal applicant and take over the use of the frequency. Resolving such proceedings entails the classic task of comparing apples (i.e., the incumbent's performance as a licensee) and oranges (i.e., the challenger's promises of what its own performance will be).<sup>40</sup>

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36. 44 U.S.C. §§ 3501 *et seq.* (1980).

37. During fiscal years 1981 and 1982, the FCC reduced by nearly 65 percent the paperwork burden it places on those regulated by the agency. COUNCIL OF INDEPENDENT REGULATORY AGENCIES, *REGULATION RELIEF AS THE INDEPENDENT REGULATORY AGENCIES*, 19 (1982). The FCC was the single most effective agency in the federal government in eliminating unnecessary paperwork in 1981. *Id.* (Of course it did have more pieces of paper to eliminate.)

38. The Commission's decision to reduce substantially the broadcast renewal form was upheld recently in *Black Citizens for a Fair Media v. FCC*, Nos. 81-1710 & 81-2277, slip op. (D.C. Cir. 1983). A reversal of the Commission's decision would have undermined the FCC's momentum to reduce paperwork requirements in other areas.

39. Boren points out that a mumble can never be quoted. He acknowledges, however, that all mumblerers are not bureaucrats—some are members of Congress or the House of Commons. J. BOREN, *supra* note 35, at 127.

40. Two FCC Commissioners, borrowing from Sir Winston Churchill, referred to this choice as:

In September, 1973, then-Chairman Dean Burch made the following admission against interest before the International Radio and Television Society:

If I were to pose the question, what are the FCC's renewal policies and what are the controlling guidelines, everyone in this room would be on equal footing. You couldn't tell me, and I couldn't tell you—and no one else at the Commission could do any better, least of all the long-suffering renewals staff.

The same statement could be made today. Indeed, the situation has become more complicated. Aware of its shortcomings in this area, the Commission recently instituted a rule-making proceeding intended to make sense out of the whole comparative renewal conundrum.<sup>41</sup>

That, unfortunately, is not all the FCC has done. Pending resolution of that rule-making, the Commission has gone forward with comparative renewal proceedings already on file. In so doing, it has had at least one occasion to set some rather inconsistent standards. In the case of a classical music FM station in Gloucester, Massachusetts, licensed to a self-reliant old fellow named Simon Geller, the Commission concluded that a lack of locally-oriented nonentertainment programming undermined the "renewal expectancy" that the incumbent licensee might otherwise enjoy.<sup>42</sup> This result does not appear inherently unreasonable in light of the Commission's historical concern about locally-oriented nonentertainment programming. It does not become absurd until it is noted (as attentive readers of Axioms 1 and 4 will recall) that *prior to* the Gloucester decision, the Commission *eliminated* rigid percentage guidelines

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a riddle within an enigma within a conundrum. The riddle: by what standards is a renewal applicant to be measured. The enigma: by what standards is a renewal challenger to be measured. The ultimate conundrum of course is, even assuming the establishment of such respective standards, how can there be constructed a matrix which can be used to rationally measure and compare two largely unrelatable properties: an empirical property (an existing record) and an *a priori* property (a set of applicant pledges).

Broadcasting Renewal Applicant, 66 F.C.C.2d 419, 433 (1977) (Separate Statement of Commissioners Hooks and Fogarty).

41. See Notice of Inquiry in BC Docket 81-742, adopted Oct. 22, 1981, 46 Fed. Reg. 55,279 (1981); Further Notice of Inquiry in BC Docket 81-742, adopted Sept. 29, 1982, 47 Fed. Reg. 46,117 (1982).

Perhaps the "Optimum Optimorum Principle" is applicable here: "There comes a time when one must stop suggesting and evaluating new solutions, and get on with the job of analyzing and finally implementing one pretty good solution." DICKSON, *supra* note 31, at 138.

42. Simon Geller, 91 F.C.C.2d 1253 (1982), *appeal pending*.

for minimum amounts of nonentertainment programming (or, as the cognoscenti call it, "magic minimums") which must be broadcast by commercial radio broadcasters, and it has also eliminated program logging requirements for such licensees. Moreover, it has eliminated the questions on the renewal form calling for an analysis of nonentertainment programming performance. The net result: while the FCC will apparently (at least for the time being) attach substantial, if not conclusive importance to a renewal applicant's broadcast of nonentertainment programming, it has eliminated the method (i.e., appropriately designed renewal forms) for reviewing such performance, and it has also eliminated the method (i.e., program logs) by which commercial radio licensees were required to document their performance.<sup>43</sup>

Now the apparent inconsistency of all this might very well be attributed to deregulatory growing, or rather, shrinking, pains.<sup>44</sup> But, in the meantime, the *Simon Geller* decision sheds about as much light on the Commission's comparative renewal policy as (to borrow a useful metaphor from the FCC's Review Board) "a damp matchstick at RFK Stadium with all the field lights on—at high noon."<sup>45</sup> The Commission appears to be giving to broadcasters with one hand and taking away with the other. While the Commission plays Santa with some, Simon Geller got coal in his stocking.

## Antediluvian Axiom 6

### The Best Technical Standard Is No Technical Standard

If you stand at one end of a crowded chicken coop and make a loud noise, all the chickens will look up simultaneously and, after an instant's "thought," run around, usually smashing themselves into walls. The same thing occurs if you stand in the corridors of the FCC and shout "Marketplace Forces!" The

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43. Note, however, that the U.S. Court of Appeals for the District of Columbia recently directed the Commission to modify its radio deregulation decision to require radio licensees to maintain some method of recordkeeping to enable the Commission and the public to monitor a licensee's compliance with the Commission's programming requirements. *Office of Communications of the United Church of Christ v. FCC*, No. 81-1032, slip. op. (D.C. Cir. May 10, 1983).

44. And in any event, one should not lose sight of Emerson's observation that "consistency is the hobgoblin of little minds. . . ." Emerson, *Self-Reliance* (1841), J. BARTLETT, *FAMILIAR QUOTATIONS* 501b (1955).

45. *Cleveland Television Corp.*, 91 F.C.C.2d 1129, 1145 (1982) (Blumenthal, Board Member, concurring *dubitante*).

current Commission is so infatuated with the idealized concept of marketplace regulation—a concept quite appropriate in many areas of its concern—that it is often blind to the sensible limitations of that concept. So it goes with infatuation.<sup>46</sup>

As indicated in Antediluvian Axiom 1, there is a respectable body of thought and law which indicates that some traditional areas of FCC regulation should yield to marketplace regulation. Program content regulation is a glaring case in point. On the other hand, some areas are not susceptible to the dynamic pull of buyer and seller. In particular are bedrock technical matters. This is because the primary function the FCC was organized to perform is to ensure the overall technical excellence of the nation's broadcast services—to be a spectral “traffic cop” as it were. Regardless of the program content to be transmitted, the technical quality of those services was intended to be maximized.<sup>47</sup>

The Commission probably does not disagree with this proposition. It has evinced a willingness, however, to bow out of any significant role in the technical area in some instances, preferring to leave the setting of technical standards to marketplace forces. This is akin to turning off all the traffic lights in the midst of rush hour.

In the case of AM stereo, the FCC was confronted with five different stereo systems, none of them immediately compatible. Rather than establish specific standards, run exhaustive tests, and ultimately endorse one of the systems (or a composite system) as technically superior, the Commission announced some loose standards, concluded that all five systems met those standards, and washed its hands of the ultimate choice.<sup>48</sup> Instead, the FCC let the marketplace decide.

There are serious difficulties with this misplaced reliance on the market. Simply stated, the factors which may influence the

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46. Mark Fowler's “commitment to the marketplace has become so much apart of the Washington folklore that former Commissioner Robert E. Lee, raconteur extraordinaire, has worked a reference to it into his repertoire: “‘The first time I laid eyes on him,’ Lee says, ‘I wondered who the young man with the mellifluous voice was, so I asked him his name. He said, ‘Let the marketplace decide.’” *Mark S. Fowler: The Name Spells Marketplace*, BROADCASTING, April 5, 1983, at 175.

47. This is the “Deliver the Mail” function, as opposed to the “Holy Grail” function. See *supra* note 7 and accompanying text.

48. “Success in a bureaucracy depends not so much on whom you please, but on whom you avoid making angry. *Corollary*: To succeed, concentrate not on doing great things, but on the avoidance of making mistakes.” “Transiles Law of Bureaucratic Success,” from DICKSON, *supra* note 31, at 212.



public's decision to buy one technical system over another (i.e., marketing, packaging, etc.) do not necessarily bear any relation to the *technical* efficiency of the service. Further, even though the invisible hand of the marketplace might ultimately select a single system, the inefficiencies of the marketplace selection process guarantee that no such choice will emerge for years. All five proponents of the AM stereo systems will wage lengthy, costly battles to establish a foothold in the marketplace. But system manufacturers will be reluctant to commit themselves to the mass production of AM stereo units until they are able to ascertain which system will prevail in the marketplace. Few broadcasters are interested in buying a system for which there may never be any receivers available. To complicate matters, the antitrust laws prohibit broadcasters from deciding the issue themselves.

The resulting chicken and egg dilemma ultimately delays the introduction of new broadcast services. Thus, while the Commission continues to regulate in areas where it does not belong and where a marketplace approach is proper, it has defaulted on its legitimate "traffic cop" function. When it comes to policing the spectrum, the FCC is "copping out."

Instead of learning from the past, the Commission engaged in "instant replay" and abandoned to the marketplace its duty to set technical standards for teletext. In the near future the Commission will consider whether to set technical standards for TV stereo. Ideally, the Commission will avoid reliance on Antediluvian Axiom 6 in approaching this and other threshold decisions concerning new communications technologies. If it does not, it may consign promising new services to the same fate as AM stereo and teletext.

### Antediluvian Axiom 7

#### The Raised Eyebrow Is An Uplifting Regulatory Gambit

Dan Greenberg, in his classic work, *How to Be a Jewish Mother, A Very Lovely Training Manual*, observed that underlying all techniques of Jewish motherhood is the ability to plant, cultivate and harvest guilt. "Control guilt," he said, "and you control the child."<sup>49</sup> The lifted eyebrow approach to regu-

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49. D. GREENBURG, *HOW TO BE A JEWISH MOTHER, A VERY LOVELY TRAINING MANUAL*, 13 (1964).

lation is the FCC's way of planting, cultivating and harvesting guilt and controlling the behavior of broadcasters.

Judge David Bazelon noted that while the main threat to broadcasters is that the government can put a licensee out of business, "the more pervasive threat lies in the *sub rosa* bureaucratic hassling which the Commission can impose on the licensee, *i.e.*, responding to FCC inquiries, forcing expensive consultation with counsel, immense record-keeping and the various attendant inconveniences."<sup>50</sup> He observed that "licensee political or artistic expression is particularly vulnerable to the 'raised eyebrow' of the FCC; faced with the threat of economic injury, the licensee will choose in many cases to avoid controversial speech in order to forestall that injury."<sup>51</sup> There are many examples of this process—ranging in the past from anxiety-producing speeches of FCC Chairmen at the annual conventions of the National Association of Broadcasters<sup>52</sup> to the application processing guidelines which enable the FCC to control TV programming.

And what can you say about an agency that tried to ban "Puff the Magic Dragon"? That was done by an FCC Public Notice reminding broadcasters of their duty to exercise responsible judgment with regard to airing records "tending to promote or glorify the use of illegal drugs."<sup>53</sup> This reminder was coupled

50. *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 407 (D.C. Cir. 1975).

51. *Id.*

52. Newton Minow's characterization of television as a "vast wasteland" shocked a convention of the National Association of Broadcasters in May, 1961, shortly after he became chairman of the FCC. Minow challenged broadcast executives to sit down in front of their television sets for a full day, assuring them that they would observe a "vast wasteland" of game shows, violence, formula comedies, sadism, commercials, and boredom. *See Minow Observes 'a Vast Wasteland'*, BROADCASTING, May 15, 1961, at 58-59.

53. *Records, Review by Broadcast Licensees*, 28 F.C.C.2d 409 (1971); *Yale Broadcasting Co. v. FCC*, 478 F.2d 594 (D.C. Cir.) *cert. denied* 414 U.S. 914 (1973). Commissioner Nicholas Johnson dissented, criticizing the Commission's action as an unconstitutional and "Kafkaesque" attempt "by a group of establishmentarians to determine what youth can say and hear." *Id.* at 412.

[I]f the Commission majority is *really* interested in doing something about the drug problems in this country, and is not just striking out at the youth culture, why does it ignore songs like . . . "This Night":

Lady I'm looking for a jukebox  
A bar stool that fits my bottom side  
These streets are too dark for walking  
I'm in no condition to ride  
This midnight rider lost his saddle  
And I'm in, no mood, for thinking

with Congressional testimony by the Chairman of the FCC that he would vote to take away the license of a station playing drug-oriented music.

In a similar incident, the FCC announced in 1973 an inquiry to determine whether certain radio call-in programs—so-called “topless radio” shows—were obscene, indecent or profane. The next day FCC Chairman Dean Burch, speaking before the annual convention of the National Association of Broadcasters, attacked, in very strong terms, the “prurient trash that is the stock-in-trade of the sex-oriented radio talk show, complete with the suggestive, coaxing, pear-shaped tones of the smut-hustling host.”<sup>54</sup> These cases illustrate how easily the FCC can—by mastering the subtleties of Jewish motherhood—censor broadcast programming without regulation.

The Supreme Court’s 1978 decision concerning the use of “indecent” language—the so-called “Seven Dirty Words” case—enhances the Commission’s capacity to instill fear and loathing, since the Court held that the FCC had substantial discretion to review broadcasters’ programming.<sup>55</sup>

The Fowler Commission, it has been said, has been extremely circumspect in fluttering its regulatory eyebrows.<sup>56</sup> That may be attributable, in part, to the fact that budgetary and staffing cutbacks have forced the Commission to focus its

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I need some liquid consolation

This night ain't fit for nothing but drinking.

T.T. Hall, “This Night (Ain't Fit for Nothing But Drinking)” (© 1970, Newkeys, Inc.) *Song Hits*, November 1970, at 41.

*Id.* at 413, 413 n.5.

54. Illinois Citizens Committee for Broadcasting, 515 F.2d at 408.

55. *Pacifica Foundation*, 56 F.C.C.2d 94, 99 (1975) *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978). Justice Brennan, dissenting, found the decision “dangerous as well as lamentable. . . . It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.” *Id.* at 775.

56. In an address to broadcasters, Fowler observed that “the FCC has no business trying to influence by raised eyebrow or by raised voice for that matter. I confess that there was a romance bordering on chivalry when a chairman might declare television to be a vast wasteland. Those kind of pronouncements, as I see my job, are not mine to make. You are not my flock, and I am not your shepherd.” The Public’s Interest, Address by Mark Fowler to the International Radio and Television Society (Sept. 23, 1981) (FCC News Release No. 3541, at 9). *See also* Mayer, *FCC Chief’s Fears, Fowler Sees Threat in Regulation*, Washington Post, Feb. 6, 1983 at K6, col. 4. (“Television ‘is just another appliance—it’s a toaster with pictures,’ [said FCC Chairman Mark Fowler] just after taking office. Consequently, he argued, there is no reason for it to be regulated.”)

limited resources in other areas.<sup>57</sup> Nevertheless, the power to arch an administrative eyebrow will continue to exist as long as the agency retains the power of life and death—*i.e.*, the authority to issue licenses, and the power to revoke them—and as long as the agency asserts broad discretion relative to how and when it chooses to exercise its power.

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In view of the above, we have formulated seven modern axioms to guide the FCC as the electronic media enters a new, and uncharted, era:

**Modern Axiom 1:** Trust the True Marketplace; Anything the Private Sector Can Do, the Government Can Do Worse

**Modern Axiom 2:** Bigness Is In the Eyes of the Beholder: Less is Frequently Less

**Modern Axiom 3:** Think Now, Act Later: Placing the Horse Before the Cart Makes for a Smoother Ride

**Modern Axiom 4:** Suppress the Urge to Wrap Something Up with Paper and Tie It with Red Tape

**Modern Axiom 5:** When in Doubt, Eschew Interim Authorizations and Complete the Rule-Making

**Modern Axiom 6:** Failure to Adopt Technical Standards Is Tantamount to a Double Standard

**Modern Axiom 7:** Concentrate on Being a Traffic Cop and Get Rid of the Vice and Morals Squad

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57. See Wicker's Law: "Government expands to absorb revenue—and then some." DICKSON, *supra* note 31 at 185.

